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No. 94-899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,
Petitioner,

v.

HAROLD LYNCH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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14pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
I. The Court of Appeals' decision conflicts with this Court's precedent because it remands an action for an evidentiary trial on the substantive constitutional claims against a state official without determining whether those claims constitute a suit against the State in violation of the State's fundamental right to Eleventh Amendment immunity.	1
II. The Court of Appeals' opinion directly conflicts with this Court's opinion in *Ex parte Young* and decisions in other Circuits which hold that in the absence of a sufficient connection between the official sued and enforcement of the allegedly unconstitutional statute, the suit constitutes a suit against the State in violation of the Eleventh Amendment.	5
III. The Court of Appeals' decision allows claims under 42 U.S.C. § 1983 against State officials for retrospective relief in violation of the Eleventh Amendment.	8
Conclusion	10

TABLE OF AUTHORITIES

Page(s)

Cases:

Cory v. White, 457 U.S. 85 (1982) 3

Edelman v. Jordan, 415 U.S. 651 (1974) 8,9

Ex parte Young, 209 U.S. 123 (1908) 6,7

Green v. Mansour, 474 U.S. 64 (1985) 8,9

Kurz v. State of Michigan, 548 F.2d 172 (6th Cir. 1977), *cert. denied*, 434 U.S. 972 (1977) 5

Long v. Van de Kamp, 961 F.2d 151 (9th Cir. 1992) 5

Papasan v. Allain, 478 U.S. 265 (1986) 8,9

Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89 (1984) 3

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. ___, 113 S.Ct. 684 (1993) 4

Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2439 (1993). 5

Southern Pac. Transp. Co. v. Brown, 651 F.2d 613 (9th Cir. 1980) 5

Constitutional Provision:

U.S.C.A. Const. Amend. 11 ..... *passim*

Statutes:

28 U.S.C. §1254 2

42 U.S.C. § 1983 8

Mo. Rev. Stat. §104.342 (Supp. 1991) 8

Mo. Rev. Stat. § 527.110 (1986) 6

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I. The Court of Appeals' decision conflicts with this Court's precedent because it remands an action for an evidentiary trial on the substantive constitutional claims against a state official without determining whether those claims constitute a suit against the State in violation of the State's fundamental right to Eleventh Amendment immunity.

In its brief in opposition to the Attorney General's petition[1], Respondents argue that this Court cannot, and should not, review the

[1] In response to the Attorney General of Missouri's (hereinafter the "Attorney General") Petition for Writ of Certiorari in Case No. 94-899 and the Public School Retirement System of Missouri's (hereinafter "PSRS") Petition in Case No. 94-815, Respondents filed one brief in opposition. This reply will only address those issues related to the Petition of the Attorney General.

Eighth Circuit's refusal to determine whether Respondents' claims against the Attorney General constitute a suit against the State of Missouri in violation of the Eleventh Amendment before remanding this case to the District Court for an evidentiary trial on Respondents' substantive constitutional claims.[2]

In an attempt to justify the Eighth Circuit's inaction, Respondents argue that the Eighth Circuit did in fact resolve the fundamental question of whether Respondents' claims against the Attorney General constitute a suit against the State of Missouri in violation of the Eleventh Amendment. It merely rejected the Attorney General's claims without specific delineation of the reasoning behind its decision. Res. Br., P. 5. Next, Respondents attempt to argue that this failure has no constitutional significance because the Attorney General has already had sufficient appellate review of its immunity claim. Res. Br., P. 6. Both of these assertions are factually and legally insupportable and should be rejected by this Court.[3]

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[2] Respondents appear to argue that this Court as a matter of law, does not have the ability to review the Eighth Circuit's failure to address the fundamental issue of whether Respondents' claims against the Attorney General of Missouri constitute a suit against the State of Missouri in violation of the Eleventh Amendment. Respondents' Brief in Opposition, P. 6 (hereinafter "Res. Br. P.__"). Plainly under 28 U.S.C. §1254, this Court has the authority to reverse the Eighth Circuit's decision which exceeded its jurisdiction by 1) remanding this case to the District Court without determining whether Respondents' claims against the Attorney General constitute a suit against the State of Missouri in violation of the Eleventh Amendment and 2) requiring the District Court to proceed with an extrajurisdictional trial on Respondents' substantive constitutional claims without such a determination.

Given the important issues presented in the Attorney General's Petition regarding the fundamental right of States not to be sued in federal court and the permissible scope of federal court jurisdiction, this Court should exercise that authority and reverse the Eighth Circuit's decision.

[3] In its response to the Attorney General's Petition, Respondents challenge the Attorney General's statement of the case as containing serious inaccuracies and omissions. Res. Br., P. 2-3. The Attorney General intended to enumerate sufficient facts necessary to enable this Court to decide the immunity issues presented in his Petition. Significantly, Respondents in their attempt to impute an improper motive to the Attorney General do not claim that the facts as presented by the Attorney General are insufficient to determine the immunity issues presented.

Respondents first attempt to deny that the Eighth Circuit refused to address, much less resolve, the fundamental issue of whether Respondents' claims against the Attorney General constitute a suit against the State of Missouri in violation of the Eleventh Amendment.[4] This is in direct conflict with the Eighth Circuit's opinion itself. First, the Eighth Circuit refused to determine whether, in the absence of any connection with the enforcement of the statute that allegedly violated Respondents' rights, this suit against the Attorney General constitutes a suit against the State of Missouri, which absent a waiver, cannot proceed regardless of the relief sought. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 102, citing *Cory v. White*, 457 U.S. 85, 90-91 (1982). Instead, it proceeded directly to determine whether the relief sought was prospective in nature, an analysis that becomes relevant *only* if the suit does not constitute a suit against the State of Missouri. Pet. App. A-25.

Secondly, the Eighth Circuit expressly refused to examine which remedies, if ordered against the Attorney General, would violate the Eleventh Amendment. The Court specifically stated as follows:

> At this time we need not determine the outer limits of the district court's authority to order particular remedies, such as refunds to plaintiffs. It is sufficient for now to say that the district court clearly has the authority to find the statutory scheme unconstitutional and to order an appropriate remedy.

Pet. App. A-25. This cannot be construed as the omission of "specific delineation or discussion of the analysis and reasoning behind its holding that Petitioners are not entitled to Eleventh Amendment immunity" as Respondents attempt to characterize the Eighth Circuit's opinion. Res. Br., P. 6. This is a blatant refusal to determine what relief

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[4]Respondents attempt to argue that the Attorney General admits that the Eight Circuit made this necessary and fundamental inquiry because the Attorney General maintains that the effect of the Eighth Circuit's refusal to look at this issue is a denial of the State of Missouri's fundamental right not to be sued in federal court. Res. Br., P. 5. To the contrary, the Attorney General does not admit that the Eighth Circuit resolved this most basic and fundamental issue. Respondents are attempting to bootstrap the effect of the Eighth Circuit's abdication of its responsibility to resolve these issues, into what the Eighth Circuit actually did.

is permissible, and against whom the relief would be appropriate consistent with the Eleventh Amendment. Yet, this determination is essential in determining whether the Eleventh Amendment bars Respondents' claims against the Attorney General.

Respondents next argue that this Court should not review the Eighth Circuit's opinion because to allow States to vindicate their claims to Eleventh Amendment immunity is "unwarranted," "inundating," and "the cost to the courts and the parties of permitting such an exhaustive piecemeal litigation clearly outweighs any benefit to be derived therefrom." Res. Br., P. 6. This Court has already balanced the fundamental right of States and their officials to be free from suit in federal court and the efficiency concerns listed by Respondents. That balance mandates that the entitlement to immunity be determined prior to the State being subjected to a trial on the underlying claims of Respondents.

In *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, ___U.S.___, 113 S.Ct. 684, 687 (1993), this Court held that States and their entities may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity from suit in federal court. Moreover, the Court held that the Eleventh Amendment is a withdrawal of jurisdiction that confers immunity, not just from liability after a full trial on the merits of the underlying claim, but from suit in the first instance. *Id.*

The basis for this decision is threefold. First, the denial of Eleventh Amendment immunity purports to be a conclusive determination that a State has no right not to be sued in federal court. *Id.* at 688. Second, a State's claim to Eleventh Amendment immunity "involves a claim to a fundamental constitutional protection, whose resolution generally will have no bearing on the merits of the underlying action." *Id.* Third, the value of a State's constitutional immunity is effectively lost as litigation proceeds past motion practice and the denial of immunity is effectively unreviewable on appeal after a final judgment. *Id.* Though it appears that Respondents do not agree with the Eleventh Amend-

ment principles espoused by this Court in *PRASA*, they have offered no valid reasons why this Court should reverse its recent decision.[5]

II. The Court of Appeals' opinion directly conflicts with this Court's opinion in *Ex parte Young* and decisions in other Circuits which hold that in the absence of a sufficient connection between the official sued and enforcement of the allegedly unconstitutional statute, the suit constitutes a suit against the State in violation of the Eleventh Amendment.

In its opposition to the Attorney General's Petition, Respondents specifically state "...there is no conflict between the judgment of the Eighth Circuit for which a review is sought and the decisions of other Courts of Appeals." Res. Br., P. 4. However, Respondents do not even attempt to reconcile the Eighth Circuit's decision with the decisions in other Courts of Appeals which hold that the official sued must have a sufficient connection with the enforcement of the statute that allegedly deprived plaintiffs' rights or the suit is nothing more than an attempt to sue the State itself in violation of the Eleventh Amendment. *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437, 441 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2439 (1993); *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir, 1992); *Southern Pac. Transp. Co. v. Brown*, 651 F.2d 613, 614-15 (9th Cir. 1980); and *Kurz v. State of Michigan*, 548 F.2d 172, 174-75 (6th Cir. 1977), *cert. denied*, 434 U.S. 972 (1977). In fact, such a reconciliation would be impossible. The Eighth Circuit's opinion directly conflicts with the decisions of other Courts of Appeals which correctly applied the principles enunciated by the Court's decision in *Young*.

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[5] Respondents do not dispute the validity of the principles underlying the *PRASA* decision when referring to a district court's denial of a State's claim to Eleventh Amendment immunity. Instead, Respondents attempt to argue that the those principles do not extend to a Court of Appeals decision, which refuses to determine whether Respondents' claims constitute a claim against the State of Missouri, resulting in a denial of Missouri's claim to Eleventh Amendment immunity. Res. Br., P. 5-6. This distinction lacks any constitutional significance and should be rejected by this Court. A State's entitlement to immunity from suit is rendered no less meaningless if the Court of Appeals refuses to determine the entitlement to Eleventh Amendment or wrongfully denies it rather than a district court.

Young requires that the official sued have a sufficient connection with the enforcement of the statute that allegedly deprives the plaintiffs of their constitutional rights or the suit is a suit against the State itself in violation of the Eleventh Amendment. The Court in *Young* specifically held:

> [I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

209 U.S. at 156. In order to justify this exception to Eleventh Amendment immunity, *Young* requires not only that the official sued have the authority to enforce the law in question, but that the official has threatened to exercise, or has exercised that authority to the detriment of plaintiffs. *Id.* Otherwise suing a state official without this connection to the enforcement of the statute "is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Id.* at 157.

The Eighth Circuit's decision completely ignores this requirement, and directly conflicts with the core holding and policy behind this Court's decision in *Young*. Neither in their fourth amended complaint, nor in their brief in opposition to the Attorney General's Petition, are Respondents able to cite to any authority the Attorney General possesses to enforce the allegedly unconstitutional refund provision against Respondents — much less any action or threatened action the Attorney General has taken to the detriment of Respondents.

Respondents appear to assert that because Mo. Rev. Stat. § 527.110 (1986) requires the Attorney General to be given notice of, and an opportunity to participate in, any action involving the constitutionality of a Missouri statute, that the Attorney General is a proper party to this action consistent with the Eleventh Amendment. Res. Br., P. 17. Although the Attorney General has the ability to intervene in any action in which the State's interests are involved, where he has not used that official power to enforce an allegedly unconstitutional statute to the detriment of Respondents, any attempt to sue him in his official

capacity is merely an attempt to sue the State of Missouri in violation of the Eleventh Amendment. *Young*, 209 U.S. at 157.

Respondents further contend that the Attorney General, as the statutory attorney for the PSRS and the Missouri State Retirement System (hereinafter "MOSERS") had authority to enforce the allegedly unconstitutional statute to their detriment. Res. Br., P. 19. Merely being the statutory attorney for these entities conferred no power on the Attorney General to adopt, implement or enforce the refund scheme Respondents allege violated their rights. Nor does this representative role provide sufficient connection to the enforcement of the statute to allow justify prospective relief under *Young*. 209 U.S. at 157-58.

It is clear from the face of Respondents' fourth amended complaint, that the Attorney General has not threatened to use his official authority to the detriment of Respondents and in fact has no authority to do so. The Eighth Circuit's decision in this case requiring the Attorney General to remain a party to this lawsuit absent any connection with the enforcement of the statutory scheme that allegedly violated Respondents' rights effectively allows a suit against the State of Missouri in violation of the Eleventh Amendment. This decision contradicts not only the holding, but the core policy behind this Court's decision in *Young* and conflicts with the decisions of other Court of Appeals decisions who correctly applied *Young*.

Without clarification from this Court, the Eighth Circuit's opinion will allow a perspective plaintiff to sue any state official regardless of whether or not they had any connection with the enforcement of the allegedly unconstitutional statute, in an attempt to secure a judgment against a State in violation of the Eleventh Amendment.[6]

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[6] Respondents continually assert that the State is not the "real, substantial party in interest merely because the Attorney General has been named as a nominal party..." Res. Br., P. 18. Yet, because the Attorney General had absolutely no connection with the refund scheme at issue, this suit against the Attorney General constitutes a suit against the State of Missouri. Clearly the State of Missouri has a "real" and "substantial" interest in this lawsuit brought in violation of its fundamental right to immunity.

III. The Court of Appeals' decision allows claims under 42 U.S.C. § 1983 against State officials for retrospective relief in violation of the Eleventh Amendment.

Assuming for the sake of argument that the Attorney General is a proper party to this lawsuit, Respondents' claims against the Attorney General — which seek only retrospective relief — are nonetheless barred by the Eleventh Amendment. In reversing the District Court's determination that Respondents' claims against the Attorney General are barred, the Eighth Circuit relied on an erroneous characterization of the nature of the alleged constitutional violation as well as the nature of the relief sought by Respondents in denying the Attorney General Eleventh Amendment immunity.

As enumerated by the Attorney General in his initial Petition, the District Court examined the specific nature of the violation and found that "[t]here is simply no ongoing violation of federal law. Any alleged violation occurred in 1987 and 1989 when the then present state employees received refunds of their pension contributions to the exclusion of plaintiffs under § 104.342." Pet. App. A-19 - A-20. The District Court's opinion is consistent with decisions of this Court, which hold that such past alleged action cannot be deemed "ongoing" for purposes of the Eleventh Amendment. Yet in their brief in opposition, Respondents wholly failed to distinguish their attempt to plead a continuing wrong by alleging that PSRS continues to refuse to refund their retirement contributions, from the same pleading maneuvers rejected by this Court in *Papasan v. Allain*, 478 U.S. 265, 280 (1986) and *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

With regard to the nature of the relief requested the District Court found that:

> "[t]his court may not issue a declaratory judgment finding that the state or state official violated federal law in the past when there is no ongoing violation of federal law. *Green v. Mansour*, 106 S.Ct. 423, 438 (1985). Plaintiffs seek a cash reimbursement of their contributions because they allege the state violated their constitutional rights in the past when it did not grant them refunds. This request amounts to a retroactive damage award

> which is barred by the Eleventh Amendment. See *Edelman*, 94 S.Ct. at 1358."

Pet. App.A-20. Yet, in their brief in opposition to the Attorney General's Petition, Respondents wholly failed to distinguish their request for relief from the retrospective relief this Court prohibited in *Green v. Mansour*, 474 U.S. 64 (1985)[7], *Edelman*, 415 U.S. at 668, and *Papasan*, 478 U.S. at 280, as violative of the Eleventh Amendment.

The Eighth Circuit's opinion, which accepts at face value Respondents' semantical attempts to avoid the Eleventh Amendment and fails to look at the substance of the injury alleged and the relief requested by Respondents, eradicates the distinction this Court has carefully drawn between valid prospective injunctive relief, which is necessary to vindicate the federal interest in assuring the supremacy of federal law, and retrospective relief, which is clearly barred by the Eleventh Amendment. Intervention by this Court is necessary to prevent the Attorney General, and hence the State of Missouri, from being subjected to this extrajurisdictional trial on Respondents' substantive constitutional claims when it is clear from the face of Respondents' complaint that the Attorney General and the State of Missouri are entitled to Eleventh Amendment immunity.

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[7]Respondents make a feeble attempt to distinguish on its facts this Court's decision in *Green* from the present case. Res. Br. P. 19-20. This attempt, however, does not distinguish the legal applicability of *Green* to the present case. The salient principle of *Green* is that where there is no availability for valid prospective injunctive relief under *Young*, a declaration that state officials violated the Constitution in the past would serve no other purpose except to allow Respondents to offer such a declaration in the state court proceeding already filed as evidence of liability. *Green*, 474 U.S. at 74. Respondents could then claim the only issue left for determination is damages. To allow a declaration in such circumstances would in effect be indistinguishable from a full fledged award of damages against the State in violation of the Eleventh Amendment. *Id.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted by this Honorable Court.

Respectfully Submitted,

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